

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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**United States Court of Appeals for the
District of Columbia**

APRIL TERM, 1939.

No. 7517

542

**PENNSYLVANIA INDEMNITY FIRE CORPORATION,
A CORPORATION, PLAINTIFF IN ERROR,**

vs.

HARRY E. ALDRIDGE.

**IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA**

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United States Court of Appeals for the District of Columbia

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PENNSYLVANIA INDEMNITY FIRE CORPORATION,
A CORPORATION, PLAINTIFF IN ERROR,

vs.

HARRY E. ALDRIDGE, DEFENDANT IN ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA

INDEX.

	Original	Print
Caption	1	1
Declaration	2	1
Plea	4	3
Motion for Judgment "non obstante veredicto" and for New Trial	5	3
Memoranda of Hearing of Motion	6	5
Judgment on Finding Entered	6	5
Writ of Error	7	5
Bill of Exceptions	8	7
Assignment of Errors	22	19
Designation of Record	23	20
Certificate of the Clerk	24	20

United States Court of Appeals for the District of Columbia

1 Municipal Court of the District of Columbia

No. A-13,749

HARRY E. ALDRIDGE, *Plaintiff*,

vs.

PENNSYLVANIA INDEMNITY FIRE CORPORATION, A CORPORATION,
Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the Municipal Court of
the District of Columbia, at the City of Washing-
ton, in said District, at the times hereinafter men-
tioned, the following papers were filed and pro-
ceedings had, in the above-entitled cause, to wit:

2 In the Municipal Court of the District of
Columbia

No. A-13,749

HARRY E. ALDRIDGE, 1244 Raum Street, N. E., Washington,
D. C., *Plaintiff*,

vs.

PENNSYLVANIA INDEMNITY FIRE CORP., a corporation, Phila-
delphia, Pennsylvania, *Defendant.*

Declaration

The plaintiff, Harry E. Aldridge, sues the defendant, Pennsylvania Indemnity Fire Corporation, a foreign corporation, doing business in the District of Columbia, for that, heretofore, to wit, on the 21st day of October, 1937, the defendant, for and in consideration of the sum of \$32.08 paid or agreed to be paid by the plaintiff to the defendant, issued and delivered to the said plaintiff, its cer-

tain policy of insurance and endorsement attached thereto and forming a part thereof, known as "Comprehensive loss of or damage to motor-vehicle endorsement (type 3)," by which said policy and endorsement the defendant agreed, thirty (30) days after the notice, ascertainment, estimate and verified proof of loss shall have been received by it, to pay the plaintiff for any loss of or damage to a certain motor-vehicle, described therein, and/or its attached equipment, with certain exceptions, occurring during the term beginning at noon on the 21st day of October, 1937, and ending at noon on the 21st day of October, 1938, to an amount not exceeding \$650.00; and thereafter on, to wit, the 14th day of January, 1938, while the said policy and endorsement were in full force and effect, the said motor-vehicle was unlawfully taken from the said plaintiff without the knowledge or consent of the said plaintiff, as a result of which the said plaintiff sustained a direct loss in the sum of \$690.52, as more fully appears in the bill of particulars attached hereto and hereby made a part hereof; said loss and damage was not within any of the exceptions contained in said policy or endorsement; on, to wit, the 17th day of January, 1938, the said plaintiff gave notice in writing to the said defendant of the loss and damages sustained as aforesaid, and demanded payment of the said

3 damages; and on, to wit, the 29th day of April, 1938, the defendant received from the plaintiff an estimate and verified proof of loss in respect of said loss and damage; the said plaintiff has in all respects complied with the terms and conditions of said policy agreement on his part to be performed, but although thereunto requested, the said defendant has refused and still refuses to pay the amount of said damages or any part thereof.

Wherefore the plaintiff brings his suit and claims of the said defendant the sum of \$650.00 with interest thereon from the 29th day of May, 1938, besides costs.

.....

SIMON, KOENIGSBERGER AND YOUNG,

SIMON, KOENIGSBERGER & YOUNG, JULIAN H. REIS
340 Woodward Building, Washington, D. C.

4 In the Municipal Court of the District of
Columbia

No. A-13749

HARRY E. ALDRIDGE, 1244 Raum St., N. E., Washington,
D. C., *Plaintiff*,

vs.

PENNSYLVANIA INDEMNITY FIRE CORP., a corporation,
Philadelphia, Pennsylvania, *Defendant*.

Plea

For Plea to the Declaration filed herein the Pennsylvania Indemnity Fire Corporation admits that it issued to the plaintiff a certain Policy of Insurance and that such Policy of Insurance was in force during the period indicated in the Declaration. The Defendant denies that the motor vehicle named and described in the Policy of Insurance was unlawfully taken from the Plaintiff without his knowledge or consent and this Defendant further denies that the loss sustained by the Plaintiff was not within any of the exceptions contained in the said Policy or the endorsement thereto.

CHAS. S. BAKER

BENJ. L. TEPPER

Attorneys for defendants.

5 In the Municipal Court of the District of
Columbia

No. A-13-749

HARRY E. ALDRIDGE, *Plaintiff*,

vs.

PENNSYLVANIA INDEMNITY FIRE CORPORATION, a corporation,
Defendant.

*Motion for Judgment Non Obstante Veredicto and for
New Trial*

Now comes the defendant, Pennsylvania Indemnity Fire Corporation, in the above cause, and by and through its attorneys moves the Court as follows:

(a) That judgment be entered for the defendant non obstante veredicto; or

(b) That a new trial be granted herein for the following reasons:

1. The verdict is contrary to law.
2. The verdict is contrary to the evidence.
3. The Court erred in not directing a verdict in favor of the defendant.
4. The court erred in not permitting counsel for the defendant to argue to the Jury that the term "theft" contemplates an intent to deprive one of property permanently.
5. And for such other and further reasons as may be advanced at the hearing hereunder.

CHAS. S. BAKER

BENJ. L. TEPPER

Attorneys for Defendant

CHAS. S. BAKER &

BENJ. L. TEPPER

Munsey Building

MESSRS. SIMON, KOENIGSBERGER & YOUNG

Woodward Building

Attorneys for Plaintiff

Please take notice that the foregoing Motions will be directed to the attention of the Court on Wednesday, November 9, 1938, at ten o'clock A.M.

CHAS. S. BAKER

BENJ. L. TEPPER

Attorneys for Defendant

CHAS. S. BAKER &

BENJ. L. TEPPER

Munsey Building

6

Memoranda

Defendant's Motion for New Trial

Nov. 4, 1938
M 114, P 292
Judge Cayton

Defendant files motion for judgment non obstante veredicto and for new trial. Set for November 9, 1938.

Nov. 9, 1938
M 114, P 296
Judge Cayton

Time within which to hear defendant's motion for judgment non obstante veredicto and for new trial extended to November 16, 1938.

Defendant's Motion for New Trial Overruled and Judgment on Finding Entered

January 28, 1939
M 114, P 433
Judge Cayton

Defendant's motion for new trial and judgment non obstante overruled. Judgment on finding entered for Plaintiff for \$480.00. Interest from 5/29/38 and costs.

7

The United States of America, ss:

The President of the United States,
To the Honorable Nathan Cayton, Judge of the Municipal Court of the District of Columbia,

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between Harry E. Aldridge, Plain-

tiff, and Pennsylvania Indemnity Fire Corporation, a Corporation, Defendant, No. A-13,749, a manifest error hath happened, to the great damage of the said Defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Court of Appeals for the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States, the 26th day of April, in the year of our Lord one thousand nine hundred and thirty-nine.

JOSEPH W. STEWART

*Clerk of the United States
Court of Appeals for the Dis-
trict of Columbia.*

(Seal)

Allowed by D. Lawrence Groner, Chief Justice of the United States Court of Appeals for the District of Columbia.

8 In the Municipal Court of the District of
Columbia.

No. A-13,749

HARRY E. ALDRIDGE, *Plaintiff*,

vs.

PENNSYLVANIA INDEMNITY FIRE CORPORATION, a corporation,
Defendant.

Notice

MESSRS. SIMON, KOENIGSBERGER & YOUNG
Woodward Building
Washington, D. C.
Attorneys for Plaintiff

Please take notice that the attached Bill of Exceptions will be called to the attention of and submitted to Judge Nathan Cayton on the 2d day of Sept., 1939, at 10.30 o'clock, A. M., for the purpose of having the same signed and sealed by the Court.

CHAS. S. BAKER
BENJ. L. TEPPER
WARREN E. MAGEE
Attorneys for Defendant,

CHAS. S. BAKER
BENJ. L. TEPPER
WARREN E. MAGEE
Munsey Building

Service of the foregoing Notice and receipt of copy of said Bill of Exceptions acknowledged this 29 day of August, 1939.

LEROY S. BENDHEIM
Attorney for Plaintiff

In the Municipal Court of the District of
Columbia.

No. A-13,749

HARRY E. ALDRIDGE, *Plaintiff*,

VS.

PENNSYLVANIA INDEMNITY FIRE CORPORATION, a corporation,
Defendant.

Bill of Exceptions

1. Be it remembered that at the trial of this case before Judge Nathan Cayton and a Jury, duly impaneled and sworn to try the issues herein, which trial took place on November 1, 1938, the plaintiff herein testifying in his own behalf, stated in substance, both in direct and re-direct examination, as follows:

That the defendant issued to him and in his behalf during the month of October, 1937 a policy of insurance, which policy without objection was admitted into evidence and the pertinent portion of which is attached hereto marked "Defendant's Exhibit A"; that sometime in the early part of January, 1938 he contracted with a colored boy by the name of Harrison, whom he knew as the boy who delivered papers at his house, to clean and simonize his car at an agreed price of Two Dollars (\$2.00). The boy was to furnish the materials and the plaintiff exercised no direction over the manner or method of doing the job. On the morning of the 14th of January, 1938, at about ten or ten thirty o'clock, while the plaintiff was asleep, the boy called at his home for the purpose of cleaning and simonizing the plaintiff's car; that he requested and received from plaintiff's wife the key to the car in order to clean it on the inside. The car had been parked the previous evening in the open about a block up the street from plaintiff's home. The plaintiff did not authorize the boy Harrison to move the car from the place where it was parked. At about two o'clock of the same day the plaintiff was called by the police of No. 12 Precinct as a result of which he discovered
10 that his car was in a wrecked condition at 17th and Jackson Streets, N. E., about a mile or a mile and a half from his home.

2. Thereupon, Mrs. Aldridge, wife of the plaintiff, testifying on behalf of the plaintiff, stated in substance as follows:

That on the morning in question the colored boy called at the Aldridge home for the purpose of cleaning and simonizing the plaintiff's car, and the door was answered by Mrs. Aldridge and the boy asked her for the key to the car. Mrs. Aldridge, after ascertaining from her husband that he had arranged to have the car cleaned and simonized, delivered the key to the boy. Mrs. Aldridge testified further that she did not authorize the boy to move the car, and when she next heard about it it was two o'clock in the afternoon, when the police called in regard to it.

3. Thereafter, one Carroll A. Alber, Studebaker car dealer, testifying on behalf of the plaintiff, stated in direct and re-direct examination in substance as follows:

That the repairs necessary to the Aldridge car were in the reasonable sum of Six Hundred Ninety Dollars and Sixty Six Cents (\$690.66), and that he allowed Mr. Aldridge the sum of Two Hundred Forty Five Dollars (\$245.00) as a trade-in value for the car in its wrecked condition. That Mr. Aldridge's car before the wreck had a value of from Seven Hundred Forty Five Dollars (\$745.00) to Seven Hundred Sixty Five Dollars (\$765.00).

4. Thereupon one James G. Beach of the Metropolitan Police Department testified on behalf of the plaintiff and stated in substance:

That on January 14, 1938, he arrested the boy Harrison as the driver of the Studebaker car that was in a wreck at 17th and Jackson Streets, N. E. That Harrison told him that he had contracted to clean and simonize the car, but that he did not have the key to get inside of the car, the car being locked up, and that he went to the plaintiff's home and asked the plaintiff's wife for the key, telling her that he wanted to clean the car on the inside, and that she gave it to him; that after he had finished cleaning the car he took

the same and with three other colored boys went out
11 into Maryland, either Hyattsville or Riverdale, and
was returning from there when the accident occurred
at 17th and Jackson Streets, N. E. Mr. Beach further testified that he asked Harrison whether he had authority to drive the car and Harrison answered that he had been in

the habit of driving cars around that he was cleaning; that he did not have authority to drive this particular car nor did he tell anybody he was going to do so, but that after he had finished cleaning it he thought he would take a ride. Mr. Beach testified on cross-examination as follows:

“Q. Did the boy tell you that he had been out to Hyattsville with two or three colored boys that he picked up? A. Three other colored boys.

Q. And he told you he was returning this car to Mr. Aldridge’s place at the time? A. He said he was returning it, yes, sir.

Q. And he said he had gotten lost in coming back to town, didn’t he, gone off on the wrong street somewhere? A. I don’t recall that.

Q. Don’t you recall his saying he was looking for Rhode Island Avenue and got mixed up in the streets? A. I asked him, as a remember, why was he at Seventeenth and Jackson going back to the Trinidad section, and he told me one of the boys that was with him lived in the northwest, and that he was taking that boy home.

Q. Before returning to Mr. Aldridge’s place? A. He said he was taking that boy back home, yes, sir.

Mr. Baker. I think that is all.”

5. Thereafter, there was introduced by counsel for the plaintiff a certified copy of the record of the Criminal Division of the District Court of the United States for the District of Columbia, and being No. 61,422, which showed that Harrison had been indicted by the Grand Jury
12 for violation of Section 826(b) of the District of Columbia Code, to which indictment Harrison pleaded guilty, and was sentenced to serve for a period of six months to one year and one day, and was placed on probation.

6. Plaintiff’s counsel then rested his case, whereupon counsel for the defendant moved the Court for a directed verdict, which Motion after lengthy argument, with the Jury excluded, was over-ruled. Counsel for the defendant noted an exception to this ruling which was allowed by the Court.

7. The Jury was thereupon recalled and the Court, addressing the Jury, stated as follows:

"I think that I might clarify this for the jury. While you were waiting, we have ironed out a number of issues in the case, and the only issues remaining in the case are these, and they will be submitted to you on argument, and it will become your duty to decide two things, whether there was an unlawful taking of the car in this case on the part of the man Harrison; and if there was, then what amount you think the plaintiff is entitled to recover by way of damages. Those two simple matters we are going to submit to you for your decision."

8. Thereupon and after counsel for plaintiff had finished his summation to the Jury, Mr. Baker, for counsel for defendant, began his argument to the Jury during which he addressed them as follows:

"One of the questions that you are to decide is whether this was a theft, as to whether this colored man stole that car. What is a theft? A theft means a permanent stealing of the car—."

The Court. I do not think that I can allow that argument, because that is not in harmony with the ruling I have made in this case.

Mr. Baker. I would be interested to have your Honor say—

The Court. I will say to the jury, in line with this instruction, what I have already said, that if there was an unlawful taking, an unauthorized taking, on the part of the boy who undertook to simonize this car, that that
13 will entitle the plaintiff under this policy to recover.

Mr. Baker. Then your Honor is referring to Section 10, and ignoring these sections that I have read?

The Court. No, I do not think that I am ignoring them, sir.

Mr. Baker. Here are two exceptions—

The Court. I know, and I was at pains to make my point clear.

Mr. Baker. I am sorry, but it was not clear.

The Court. I will go over it again, if it seems to be not clear.

I will say to the jury this, that the policy, by its terms, excludes damage caused by collision or upset, unless it is caused by theft, and I will say to them that, within the

meaning of the language of this policy, they are to regard as a theft the action on the part of Harrison in taking that automobile, if they find he did take it without authority, on a mission of his own.

Mr. Baker. And without any question as to his intent?

The Court. No, I won't go into that.

Mr. Baker. Then I have nothing further to say. I am sorry.

The Court. Do you want to discuss the question of damage with them?

Mr. Baker. I have, your Honor.

Charge of the Court

The Court. Gentlemen of the jury, in the shape that this case comes to you, it comes to you in a somewhat unusual shape by reason of the fact, as you know, that for considerably more than an hour we have excluded you while we were considering certain questions of law. Those questions of law the Court has taken the responsibility of deciding, leaving certain very narrow questions of fact for you to determine.

Those of you who have served on juries before know that you are brought here, or to any court, for the purpose of deciding questions of fact. The Court does not interfere with your deliberations concerning the facts, and it becomes your sole and exclusive province to decide questions of fact. The questions of law the Court decides, and the law as I give it to you is the binding law of the case, without regard to any feeling that you may have as to what the law is or any notion you may entertain as to what the law should be. The law as you receive it from the Court constitutes the binding law of the case.

Now, gentlemen, there are two questions and only two that I am submitting to you for your decision. A great many of the facts in the case have been proven without contradiction. There is no dispute that Mr. Aldridge was the owner of this automobile. There is no dispute that he took out this policy and paid his premium. There is no dispute that while the automobile was in the possession of the man Harrison, it was involved in a collision and was upset and sustained considerable damage. There is no

dispute that Mrs. Aldridge had turned his car over to this boy for the purpose of having it washed or simonized.

Now the question is, what happened to the automobile after she turned the keys over to him? The evidence on that point, too, is uncontradicted, and yet I am leaving it for you to say what was the intent of Harrison in taking that car, if you find he did take it, where he took it, and where was he, and on what mission was he at the time the automobile was upset. There is evidence in the case tending to show that he had taken the keys for the purpose of cleaning or simonizing the car.

Now, what did he do thereafter? If he took it on a mission of his own, if he took it with the intent of going on a personal and private mission, if you find that that was without the authority of Mr. Aldridge, and you find that this collision resulted while he was on a mission of his own, or on the way back, then I charge you that the plaintiff is entitled to recover in this case.

If you find that he took the car with the authority of Mr. Aldridge, if you find that he had the authority to
15 move that car and to go on a mission for Mr. Aldridge, and that while on that mission for the owner, Mr. Aldridge, this damage occurred, then the plaintiff cannot recover in the case.

The law has been set out in an instruction that I have granted, along this line, that there is distinction between a mere custody of an automobile and the possession thereof. If you find from a preponderance of the evidence that this automobile was placed in the custody of Harry H. Harrison for the specific purpose of cleaning, washing and simonizing it, but without any authority on the part of said Harrison to use the car for his own intents and purposes, then under such a finding Harrison was in law what we call a mere custodian of the automobile, having only the temporary, physical custody thereof for the specific purpose mentioned, and the constructive possession of the automobile, which means the possession which the law construes remained at all times with the plaintiff, Mr. Aldridge; but if you further find from the evidence that the custodian, Harrison, unlawfully used the car for a purpose of his own, then under such a finding I charge you that you will regard it as a theft within the meaning and the language

and the terms of this policy, and your verdict would then be in favor of the plaintiff.

If your verdict be in favor of the defendant, no amounts are involved; your foreman will simply make that announcement. If your verdict be in favor of the plaintiff, you must go further and determine the amount of plaintiff's compensation.

Now gentlemen, the plaintiff's claim in this case is \$650. The claim is that the damage amounted to that much, or more, but the liability under the policy is limited to \$650.

You have heard evidence in this case along two lines, along one line having to do with the cost of repairing the automobile, and I charge you that you are to disregard that evidence except insofar as it may bear upon the question of value, which I am about to discuss. You are not to treat this as a claim for a repair bill, because it is not. What happened, as you will remember, was that the automobile was traded in by Mr. Aldridge. His claim is that by reason of this damage, he got a considerably lesser amount for that car in trade than he would have gotten otherwise, had it not been damaged, and that the only evidence in the case bearing upon that proposition is on the part of the witness who testified in the form of what we call expert or opinion evidence, who said that the car was worth from \$745 to \$765 before the car sustained this injury, that it was worth, and they allowed after the damage, \$275, so that his estimate of the difference in value, which is the true test which you are to follow in this case, was from \$470 to \$490, and the question that you must answer is this: To what extent was Mr. Aldridge's car damaged? To what extent was it depreciated in value by reason of this collision, and in arriving at that you will deduct what you think was the fair market value of the automobile just before the collision and just after the collision.

Now, there is only the testimony of one witness bearing on that point, and as I have already said, that is what we call opinion evidence. You are not bound by that evidence, gentlemen. You may accept that evidence or not, as you prefer. You may say that you will follow the testimony of that witness as a guide, or that you will substitute your own opinions, if you think your own opinions are more trustworthy or more accurate bearing upon that question,

but I say once more that the test you are to apply is, what is the difference in value, what was the difference in value in Mr. Aldridge's car just before and just after the collision, just before and just after the theft or what followed a theft resulting in a collision in this case.

In other words, if you follow the testimony of that witness, you will say that the damage amounts to from
17 \$470 to \$490. You may award him a lesser amount.

You may under the circumstances of this case award him a larger amount if you think that that would be proper, but in no circumstance more than \$650, because that is all that the policy covers, and that is all he claims.

You will take the case, gentlemen, and go over it in the light of the law as I have given it to you, and in the light of the facts as you find them to be, and determine if the plaintiff is entitled to recover, and, if so, how much.

Mr. Baker. For the purpose of the record, will your Honor permit me to renew those exceptions?

The Court. Yes.

Mr. Baker. Taking the position, as I honestly do, that I think that your Honor—

Mr. Bendheim. I think that we should approach the bench.

The Court. No; just tell me in substance.

Mr. Baker. Very well. I would call attention to the fact that your Honor has stated that intent did not enter into the situation, and then told the jury that they must determine the intent of the man who took the car, Harrison, and I would also call your Honor's attention to the fact that I think your Honor is instructing the jury with reference to Section 10, one of the two exceptions involved here, and the exception upon which we do not rely, rather than upon the exception that I called your Honor's attention to.

The Court. All right, sir; let those exceptions be noted.

All right, gentlemen.

(Thereupon the jury retired to consider its verdict which was later announced by the foreman as in favor of the plaintiff, in the amount of \$480.00)."

9. The instruction on behalf of the plaintiff, which the Court allowed over the exception of the defendant,
18 is in the following language:

"The jury are instructed as a matter of law that there is a distinction between the mere custody of an automobile and the possession thereof, and that if you find from a preponderance of the evidence that this automobile was placed in the custody of one Harry H. Harrison for the specific purpose of cleaning, washing and simonizing it, and without any authority on the part of the said Harrison to use the car for his own intents and purposes, then under such a finding Harrison was in law a mere custodian of the automobile, having only temporary physical custody thereof for the specific purpose above mentioned, and the constructive possession of the automobile remained at all times with the plaintiff, and if you further find from the evidence that the custodian unlawfully used the car for a purpose of his own, then under such a finding, a theft occurred under the terms of the policy of insurance, and your verdict should be in favor of the plaintiff."

The foregoing is the substance of all of the testimony and proceedings bearing upon the exceptions herein reserved on behalf of the defendant.

And thereupon, and as all of said exceptions were duly noted and allowed as aforesaid and duly entered upon the minutes of the Court, before the jury retired to consider of its verdict, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the defendant may have his case reviewed on Writ of Error, the defendant, by his attorneys, moves the Court to sign and seal this, his Bill of Exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed which Motion is granted by the Court; and thereupon the defendant tenders this, his Bill of Exceptions, and requests the Court to sign and seal the same, which is accordingly done,

19 now for then, this 5th day of September, 1939.

NATHAN CAYTON,

Justice.

Approved:

LEROY S. BENDHEIM,
Attorneys for Plaintiff.

CHAS. S. BAKER,
BENJ. L. TEPPER,
WARREN E. MAGEE,
Attorneys for Defendant.

20

Defendant's Exhibit A

In Consideration of premium at which this Policy is written, it is agreed that Pennsylvania Indemnity Fire Corporation of Philadelphia, Pa., will

Pay For Any Loss of or Damage to Described Motor-Vehicle and/or Its Attached Equipment

other than damage caused by Collision or Upset, but not exceeding a limit of insurance of \$650. subject to the Exclusions stated below.

Breakage of glass and direct damage caused by tornado, cyclone, wind-storm, hail, falling aircraft or parts thereof, and damage resulting from theft, earthquake, explosion, riot, riot attending a strike, insurrection or civil commotion, shall not be deemed damage caused by collision or upset.

The enumeration and definition of specific Perils, except of Rental Expense and of Road Service and Towing, Perils E and I, are hereby eliminated from this Policy.

Exclusions—This policy does not cover any loss or damage whatsoever (1) of robes, wearing apparel and personal effects, or to extra bodies not described herein; (2) From Depreciation; (3) From Theft, Robbery or Pilferage of tools and repair equipment, except in event of theft of entire described Motor-Vehicle, in which event tools and repair equipment shall be covered; (4) Unless as a result of a loss covered by this Policy, from (a) Wear and tear; (b) Mechanical or electrical break-downs, failures or breakages; (c) Freezing; (d) Damage to tires; (5) Resulting from the loss of use of described Motor-Vehicle, except as specifically provided under Rental Expense; (6) If the interest of Named Insured in described Motor-Vehicle is or becomes other than as stated in this policy, without the written consent of Company, except on account of death or transfer of Title to a member of Named Insured's immediate family or satisfying any encumbrance existing at the inception of this Policy; (7) While described Motor-Vehicle is rented, hired or leased to others without the written consent of Company, or is being used to carry persons for hire; (8) Caused directly or indirectly by Military, Naval or Aerial forces of foreign enemies, or confiscation, or authorized destruction by duly constituted Governmental or Civil authorities; (9) If described Motor-

21

Vehicle has ever been stolen or wrongfully taken and not returned to Insured as owner prior to the issuance of this Policy, or if Insured or any person or organization, or agent thereof, acting under express or implied authority of the Insured, voluntarily parts with title and/or possession of described Motor-Vehicle, whether or not induced so to do by any fraudulent scheme, trick, device or false pretense; (10) From the wrongful conversion, embezzlement or secretion by a mortgagor, vendee, lessee or other person in lawful possession of described Motor-Vehicle under a mortgage, conditional sale, lease or other contract or agreement, whether written or verbal; (11) If Insured or his Agent assigns this Policy for the benefit of others without the written consent of Company, or conceals or misrepresents, in writing or otherwise, any fact or circumstance in connection with obtaining this insurance, or makes attempt to defraud Company before or after loss, and then this Policy shall become null and void.

In all other respects the provisions, conditions and warranties of the Policy remain unchanged.

This endorsement is effective as of October 21, 1937 Noon, Standard Time.

Attached to and forming a part of Policy No. PC-794078 issued by Pennsylvania Indemnity Fire Corporation of Philadelphia, Pa., to Harry E. Aldridge.

PENNSYLVANIA INDEMNITY FIRE
CORPORATION

WALTER MOSES

President

Countersigned by (H. H. Hudson)

Authorized Agent

(Not valid unless countersigned by
a duly authorized agent)

Attest:

LEWIS M. CUTTER

Secretary

Dated September 29, 1937

Comprehensive Loss Of or Damage To Motor-Vehicle
Endorsement (Type 3) (Excluding Collision)

22 In the Municipal Court of the District of Columbia.

No. A-13-749

HARRY E. ALDRIDGE, *Plaintiff*,

vs.

PENNSYLVANIA INDEMNITY FIRE CORPORATION, a corporation,
Defendant.

Assignment of Errors

The defendant herein respectfully states that the Court erred as follows:

1. In denying defendant's Motion for a Directed Verdict.
2. In holding that an "unlawful taking" (meaning unauthorized use) of the vehicle by Harrison constituted "theft" under the policy.
3. In granting the plaintiff's instructions which, under the undisputed evidence, left the Jury no discretion but to bring in a verdict for the plaintiff.
4. In its charge to the Jury since the charge, under the uncontradicted evidence, made a verdict for the plaintiff obligatory.
5. In holding that the question of Harrison's (the negro boy's) intent in taking the car could not be considered.
6. In not permitting counsel for the defendant to argue to the Jury the question of Harrison's intent in taking the car for his own purposes.
7. In its charge to the Jury in that the same was confusing and in some respects irrelevant as the essential issue.
8. In not holding as a matter of law that Harrison must have had the intent to wholly and permanently deprive the plaintiff of his vehicle before "theft" could be found under the policy.

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23 In the Municipal Court of the District of Columbia

No. A-13-749

HARRY E. ALDRIDGE, *Plaintiff*,

VS.

PENNSYLVANIA INDEMNITY FIRE CORPORATION, a corporation,
Defendant.

Designation of Record

Now comes the Pennsylvania Indemnity Fire Corporation, appellant, in the above entitled cause and designates the parts of the record which it desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

(1) Declaration.

(2) Plea.

(3) Motion for New Trial together with Minute Entries showing action of the Court thereon together with entry of Judgment.

(4) Assignment of Errors.

(5) Bill of Exceptions.

(6) Copy of this Designation.

CHAS. S. BAKER

BENJ. L. TEPPER

WARREN E. MAGEE

Attorneys for defendant, appellant.

Receipt of copy of the above Designation of Record acknowledged this 11th day of September, 1939.

LEROY S. BENDHEIM

Attorney for plaintiff, appellee.

24 Municipal Court of the District of Columbia

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 23, both inclusive, to be a true and correct transcript of the record, according to direction of counsel herein filed, copy of which is made part of this transcript,

in Cause at Law, No. A-13,749, wherein Harry E. Aldridge is plaintiff, and the Pennsylvania Indemnity Fire Corporation, a corporation, is defendant, as the same that remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 13th day of September, 1939.

BLANCHE NEFF

(Seal)

Clerk.

Endorsed on Cover: No. 7517 Pennsylvania Indemnity Fire Corp., Plaintiff in error, vs. Aldridge. United States Court of Appeals for the District of Columbia Filed Sep 13 1939 Joseph W. Stewart, Clerk.

United States Court of Appeals for the
District of Columbia

APRIL TERM, 1939.

No. 7517.

PENNSYLVANIA INDEMNITY FIRE CORPORA-
TION, A CORPORATION, PLAINTIFF IN
ERROR,

vs.

HARRY E. ALDRIDGE.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

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SUBJECT INDEX.

	Page
Jurisdictional Statement	1
Statement of Case	2
Statement of Points	3
Summary of Argument	4
Argument	4
I. A case of "theft" under the policy was not proven so as to have entitled the plaintiff to recover	4
II. The charge of the Court and instruction al- lowed were virtually a direction to the Jury to find for the plaintiff	15
III. The Court erred in not having permitted counsel for the defendant to present proper and valid argument to the Jury	15
Conclusion	16

TABLE OF CASES CITED.

Allen v. Berkshire Mutual Fire Insurance Com- pany, reported October 3, 1933 in 89 A. L. R. at page 460; 105 Vt. 471; 168 Atl. 698	7
Delong v. Massachusetts Fire and Marine Co., 256 N. Y. Supp. 300	14
Fidelity & Guaranty Fire Corporation v. Ratter- man, decided in 1936 and reported in 262 Ky. at page 350, 90 S. W. (2nd series) 679	8
Frederick R. Van Vechten v. American Eagle Fire Insurance Company, 239 N. Y. 303, 146 N. E. 432, 38 A. L. R. 1115	9, 13
Globe & Rudgers Fire Insurance Co. v. House, 163 Tenn. 585; 45 S. W. (2d) 55 (1932)	13

II.

	Page
Home Insurance Co. v. Trammell, decided in 1935 and reported in 160 So. 897; 230 Ala. 278.....	6
Miller v. Newark Fire Insurance Co., 12 La. App. 315, 125 So. 150 (1929)	14
Ryan v. United States, 26 D. C. App. page 74	5

OTHER AUTHORITIES.

Article 62 of Corpus Juris, page 889	4
14 A. L. R. 215	9
24 A. L. R. 740 (with particular reference to the case of Weir v. Central National Fire Insurance Co., 189 N. W. 794; 194 Iowa 446)	9
38 A. L. R. 1124	9
Section 826 (b), Title 6, Section 62 (1929) Code...	5, 6
50 Stat. 628, 599 Supplement III of the District of Columbia Code (1929) under Title 6, Sections 60 and 61	6

United States Court of Appeals for the
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vs.

HARRY E. ALDRIDGE.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Jurisdictional Statement.

By declaration (R. 1) filed in the Court below, the plaintiff in that Court claimed that there was due to him from the defendant therein the sum of \$650.00. The Municipal Court had exclusive jurisdiction over the subject matter (Title 18, Sec. 193, District of Columbia Code, 1929). This Court granted a Writ of Error (R. 5).

As a matter of convenience, the parties will be designated as plaintiff or defendant in this brief in accordance with their position in the Court below.

Statement of Case.

The plaintiff in his Declaration (R. 1) claimed of the defendant the sum of \$650.00, the limit of coverage provided for under a policy of insurance issued to him in 1937 by the defendant (R. 17) as the result of a loss which plaintiff sustained because the motor vehicle insured under the policy was "unlawfully taken from the plaintiff without the knowledge or consent of the said plaintiff."

The defendant in its Plea (R. 3) denied that the loss sustained by the plaintiff was covered by the policy of insurance. The case was tried before a Jury duly impaneled to try the issues.

The material facts developed in the testimony by the plaintiff and his witnesses are as follows: The plaintiff engaged a colored boy whom he knew to clean and simonize his car at an agreed price (R. 8). The boy called one morning at plaintiff's home at about 10:30 o'clock for the keys to the car which was parked on the street nearby, and plaintiff's wife, after consulting with plaintiff, delivered the keys to the boy (R. 9). Neither plaintiff nor his wife authorized Harrison (the colored boy) to move the car (R. 8, 9).

After he had finished cleaning the car, Harrison took several other colored boys for a ride, drove the car into nearly Maryland and was on his way back to plaintiff's home in the District of Columbia, when, within a mile or a mile and a half of plaintiff's home, he got into an accident and seriously damaged plaintiff's car (R. 8, 9, 10).

Harrison was indicted by the Grand Jury for a violation of Section 826 (b) of the District of Columbia Code. He pleaded guilty and was placed on probation (R. 10).

The defendant offered no testimony. The amount of damage proved was approximately the amount of the Judgment, \$480.00 (R. 15).

Statement of Points

The defendant respectfully submits that the Court below erred as follows:

1. In denying defendant's Motion for a Directed Verdict.

2. In holding that an "unlawful taking" (meaning unauthorized use) of the vehicle by Harrison constituted "theft" under the policy.

3. In granting the plaintiff's instructions which, under the undisputed evidence, left the Jury no discretion but to bring in a verdict for the plaintiff.

4. In its charge to the Jury since the charge, under the uncontradicted evidence, made a verdict for the plaintiff obligatory.

5. In holding that the question of Harrison's (the negro boy's) intent in taking the car could not be considered.

6. In not permitting counsel for the defendant to argue to the Jury the question of Harrison's intent in taking the car for his own purposes.

7. In its charge to the Jury in that the same was confusing and in some respects irrelevant as to the essential issue.

8. In not holding as a matter of law that Harrison must have had the intent to wholly and permanently deprive the plaintiff of his vehicle before "theft" could be found under the policy.

Summary of Argument.

1. A case of "Theft" under the policy was not proven so as to have entitled the plaintiff to recover.

2. The charge of the Court and instruction allowed were virtually a direction to the Jury to find for the plaintiff.

3. The Court erred in not having permitted counsel for the defendant to present proper and valid argument to the Jury.

ARGUMENT.

I.

A case of "theft" under the policy was not proven so as to have entitled the plaintiff to recover.

The pertinent provision of the policy (R. 17) under which suit was brought is that damage through collision or upset is specifically excluded from coverage thereunder unless such collision or upset is accompanied by theft. A proper definition of the term "theft" is, therefore, important. Article 62 of Corpus

Juris, at page 889 defines "theft" as being a popular name or term for larceny or stealing.

In the case of *Ryan v. United States*, reported in 26 D. C. App. at page 74, Chief Justice Shepard at page 82 of the Opinion stated as follows:

"A mere intentional trespass to another's goods does not constitute larceny, but the specific intent to steal must be added."

If this dictum of Chief Justice Shepard were the only authority on this question, counsel would most strongly urge that the Court erred in finding that there was a larceny in this case. Certainly the specific intent to steal was not present in this case, and Harrison did certainly commit an intentional trespass to the plaintiff's automobile.

The attention of the Court is directed to the fact that the Grand Jury indicted Harrison (the negro boy) not for larceny but for a violation of Section 826 (b), Title 6, Section 62 (1929) Code entitled, "Unauthorized Use of Vehicles," which Section is commonly known as the "Joy-Riding Statute." Harrison, it will be remembered, pleaded guilty to a violation of this Section, which is in the following language:

"Unauthorized use of vehicles. Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven, for his own profit, use, or purpose, shall be punished by a fine not exceeding one thousand dollars or imprisonment

not exceeding five years, or both such fine and imprisonment. (Feb. 3, 1913, 37 Stat. 656, c. 23, sec. 826b.)”

This Section of the Code is, of course, separate and distinct from the Sections defining grand and petit larceny, which latter Sections were reenacted as late as August 12, 1937, being 50 Stat. 628, c599, contained in Supplement III of the District of Columbia Code (1929) under Title 6, entitled “Crimes and Criminal Procedure,” Sections 60 and 61.

It is respectfully submitted that when Congress reenacted the Sections of the Code dealing with larceny, and yet left Section 826 (b) intact, the fair presumption is that Congress intended that the “Unauthorized Use of Vehicles” is something distinct, separate and apart from larceny, and the fair inference is that Congress was reflecting the public mind as it existed as late as 1937 on that subject.

In this connection, and as reflecting the intent of the negro boy in taking the car, it is pertinent to state that in the testimony of the arresting officer, James G. Beach of the Metropolitan Police Department, the following (R. 10) appears:

“Q. Did the boy tell you that he had been out to Hyattsville with two or three colored boys that he picked up? A. Three other colored boys.

Q. And he told you he was returning this car to Mr. Aldridge’s place at the time? A. He said he was returning it, yes, sir.”

In the case of Home Insurance Co. v. Trammell, decided in 1935 and reported in 160 So. 897; 230 Ala. 278; the Supreme Court of Alabama in defining the term “theft” stated as follows:

“Clearly, under the great weight of authority, a temporary taking of the car for the use claimed by defendant, or for Murphy’s own wrongful use, but with intent to return it, not an intent to permanently deprive the owner of his property, is not ‘theft’ within this policy. That is the real issue of fact in this case.”

In this case, that is, the Trammell case, it is to be noted that the facts at issue were identical with ours. The owner of the car, namely, Trammell, delivered it to a negro youth by the name of Murphy in order that he may take it to a water hydrant a few hundred feet away to wash and simonize it. The policy of insurance issued to Trammell contained the standard provisions. Trammell had delivered the key to Murphy. An hour or two thereafter Trammell found his car about a mile away, ditched and damaged. Murphy had driven it there and had accidentally ditched it.

In an annotation to the case of *Allen v. Berkshire Mutual Fire Insurance Company*, reported October 3, 1933 in 89 A. L. R. at page 460; 105 Vt. 471; 168 Atl. 698; the meaning of theft, robbery or pilferage, terms used in automobile theft policies, was stated to be as follows (page 466):

“In order to constitute a ‘theft’ within the meaning of a policy insuring against the theft of an automobile, it is generally held that there must be present a criminal intent permanently to deprive the owner of his property. *Repp v. American Farmers’ Mut. Auto. Ins. Co.*, (1930) 179 Minn. 167, 228 N. W. 605; *Seither v. Pennsylvania Mfg. Asso. Casualty Ins. Co.*, (1932) 104 Pa. Super. Ct. 260, 159 Atl. 53; *La Motte v. Retail Hardware Mut. F. Ins. Co.*, (1930) 203 Wis. 41, 233 N. W. 566.”

“If at the time of the taking, there was present in the mind of the wrongdoer an intent to return

the automobile to its owner in good condition and within a reasonable time, no recovery can be had on such policies. *La Motte v. Retail Hardware Mut. F. Ins. Co.*, (1930) 203 Wis. 41, 233 N. W. 566."

"The terms 'robbery' and 'pilferage' as used in an automobile policy are to be considered as used in their ordinary sense. *Repp v. American Farmers' Mut. Auto. Ins. Co.*, (1930) 179 Minn. 167, 228 N. W. 605; *Allen v. Berkshire Mut. F. Ins. Co.*, (Vt.) (reported herewith) *ante*, 460; and *Granger v. New Jersey Ins. Co.*, (1930) 108 Cal. App. 290, 291 Pac. 698."

"The meaning of the words 'theft' and 'robbery' as used in such a policy must be determined by the way they are used, and by the meaning that would be attached to them by a person of ordinary learning and understanding; that is, the commonly accepted meaning by the average layman. *Nugent v. Union Auto Ins. Co.*, (1932) 140 Or. 61, 13 Pac. (2d) 343."

"These words having been selected by the insurer, if they are susceptible of more than one construction, are to be construed most strongly against the insurer. *Ibid.*"

"The word 'theft' as used in an automobile policy has no different meaning than 'theft' as usually defined; and to constitute a theft it is necessary that there be a taking of the property without the consent of the owner, coupled with an intention on the part of the taker to convert it to his own use and deprive the owner of his property rights therein. *McKenzie v. Travelers' F. Ins. Co.*, (1931) 239 Ky. 227, 39 S. W. (2d) 239."

In the case of *Fidelity & Guaranty Fire Corporation v. Ratterman*, decided in 1936 and reported in 262 Ky. at page 350, 90 S. W. (2d series) 679, the Court had under consideration a standard form of policy covering loss by theft. The following is the gist of the Court's decision in this case:

“Under theft policy covering theft, robbery, and pilferage, insured who delivered automobile to another to have it cleaned held not entitled to recover for loss sustained when automobile was later found at motor company in wrecked condition, since act of taking automobile, in absence of showing of intent to steal at that time, did not constitute ‘theft’ within policy.”

“‘Theft’ is the felonious taking and carrying away of personal property of another with intent to convert it to the use of the taker, without consent of the owner; fraudulent taking of property with intent to deprive owner of its value and to appropriate it to use of the person taking it.”

See

14 A. L. R. 215

24 A. L. R. 740 (with particular reference to the case of *Weir v. Central National Fire Insurance Co.*, 189 N. W. 794; 194 Iowa 446.)

38 A. L. R. 1124.

It will thus be seen that the Annotations to the American Law Reports with reference to the essential question involved in this case show that the attitude of the Courts has been consistent all along to the effect that the word “theft” used in the policy of insurance means a *permanent* taking of the vehicle by another with the intent to *wholly* deprive the rightful owner of his property therein.

Perhaps the most illuminating decision and authority on this question is the case of *Frederick R. Van Vechten v. American Eagle Fire Insurance Company*, 239 N. Y. 303, 146 N. E. 432, 38 A. L. R. 1115. The late Justice Cardozo, then a Justice of the New York Court of Appeals, delivered the Opinion of the Court. The language and the reasoning are so lucid and en-

lightening that counsel feel constrained to take the liberty of setting forth the Opinion in full, as follows:

"Defendant's policy of insurance covering plaintiff's automobile insures against stated perils, among them, 'theft, robbery, or pilferage,' with exceptions not now material.

Plaintiff left his automobile at a garage and repair shop with instructions to the proprietor to make specified repairs. The proprietor took the car on a trip for his own purposes, and on the homeward journey ran it against a pole. Plaintiff, returning to the garage and receiving back his damaged car, makes claim against the insurance company that it reimburse him for his loss, the question is whether there was 'theft' within the meaning of the policy.

By Penal Law (Consol. Laws, chap. 40) par. 1293-a (as it stood when this loss was suffered), 'any chauffeur or other person who without the consent of the owner shall take, use, operate or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building or place, * * * an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use or purposes, steals the same and is guilty of larceny and shall be punishable accordingly.' Laws 1910, chap. 621.

Apart from this statute, the mis-use of plaintiff's car by the proprietor of the garage would not constitute a larceny, since there was lacking the felonious intent to appropriate another's property permanently and wholly, *Parr v. Loder*, 97 App. Div. 218, 220, 89 N. Y. Supp. 823; *Ledvinka v. Home Ins. Co.*, 139 Md. 434, 19 A. L. R. 167, 115 Atl. 596; *Michigan Commercial Ins. Co. v. Wills*, 57 Ind. App. 256, 106 N. E. 725; *Phoenix Assur. Co. v. Eppstein*, 73 Fla. 991, L. R. A. 1917F, 540, 75 So. 537; *Valley Mercantile Co. v. St. Paul F. & M. Ins. Co.*, 49 Mont. 430, L. R. A. 1915B, 327, 143 Pac. 559, Ann. Cas. 1916A, 1126; *State v. South*, 28 N. J. L. 28, 75 Am. Dec. 250; *Reg. v. Trebilcock*, 7 Cox, C. C. 408; *Pollock v.*

W. Possession, p. 225. Indeed, the very purpose of the statute was to bring within the definition acts outside of it before. The courts below have held that, however great the innovation, what is now larceny under the statute is also theft under the policy. We hold another view.

The problem before us is not one of statutory construction. It is one of the meaning of a contract. The legislature may affix to new combinations of events the name of an old crime. The conclusion does not follow that the same word, and still less another word which once was an equivalent, must suffer a like extension in the thought of parties to a contract. The way is thus pointed to the decision of the case before us. 'Theft,' though often used as synonymous with 'larceny,' the proper term of art in the penal statutes of New York, is none the less a looser term, and one more colloquial or popular. *People ex rel. Jourdan v. Donohue*, 84 N. Y. 438, 442. Neither has a single meaning at all times and in all contexts, nor is either always and in every setting the full equivalent of the other. *Cf. Holmes, J., in Towne v. Eisner*, 245 U. S. 418, 424, 62 L. ed. 372, 375 L. R. A. 1918D, 254, 38 Sup. Ct. Rep. 158.

Larceny, in our law of crimes, includes the offense of obtaining property by false pretenses. Penal Law, par. 1290; *People v. Dumar*, 106 N. Y. 502, 13 N. E. 325; *People v. Miller*, 169 N. Y. 339, 351, 88 Am. St. Rep. 546, 62 N. E. 418. If the plaintiff had sold his car on a credit fraudulently procured, he would be the victim of a larceny; yet, manifestly, the sale would not be theft under the provisions of this contract. Larceny under the statute was, therefore, something different from theft under the contract, even before larceny had been extended to include misuse of motor vehicles. We have no reason to believe that the statutory definition, if inapplicable before, has become applicable now. On the other hand, we do not say that theft is to be limited to what was larceny at common law. We assume that larceny by a bailee or a fiduciary would be theft within the policy, though at common law it would be classified under the heading of embezzlement.

Pollock & W. Possession, pp. 134, 135, 157, 191. The distinction, now largely obsolete, did not ever correspond to any essential difference in the character of the acts or in their effect upon the victim. The crimes are one today in the common speech of men, as they are in moral quality. When we have recourse to these standards for the solution of our problem, the conclusion is not doubtful. The very heading of the new statute, 'Unauthorized Use of Motor Vehicles,' prefigures an offense that is something less than theft as theft has commonly been known. We read on with a deepening impression of movement from the ancient moorings. Operation of a car without the consent of the owner will be a crime, and larceny, if it continues for a month or for a day, but so, also, will it be if it continues for an hour, or even a few minutes. Innovations such as these may persist and become general. In course of time they may sink into common thought and common speech. They have not done so yet. 'Theft' under this contract is theft as common thought and common speech would now image and describe it.

One other consideration emphasizes the need for uniformity of meaning. The policy does not limit its protection to casualties suffered while the car is in New York. Theft, robbery, and pilferage in any other state are equally within its terms. This, without more, is sufficient to forbid a reading that would cause the risks to vary with the accidents of local laws. Neither insured nor insurer can have believed that the same act would be theft within the purview of the contract, if committed in New York, and a mere trespass or conversion if committed in Massachusetts or New Jersey. They spoke in terms so common, so responsive to realities, as to have a meaning everywhere. By this they must abide.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

Hiscock, Ch. J., and Pound, McLaughlin, Crane, Andres, and Lehman, J. J., concur."

In the Briefs filed with the Court below, under a Motion for a New Trial, Etc. (R. 3), counsel for plaintiff obviously recognized the strength and importance of the Van Vechten case (Frederick R. Van Vechten vs. American Eagle Fire Insurance Company, *supra*), but argued that that case was not followed in three specific instances.

The first case cited to this effect is that of Globe & Rudgers Fire Insurance Co. v. House, 163 Tenn. 585; 45 S. W. (2d) 55 (1932). A thorough reading of this case, however, discloses that the decision therein rested upon a statute in existence in the State of Tennessee known as the Act of 1921, which is in the following language:

“That it shall be a felony, punishable as larceny for any person to take the automobile, motorcycle, motor-truck, electric automobile, or truck, or vehicle of like character, belonging to another without such owner’s consent, whether such person taking such vehicle intends to deprive the owner thereof and appropriate the same to his own use permanently, or merely intends to use the same without such owner’s consent temporarily and thereafter either abandon such vehicle or return the same to the owner.”

And the Court in its Opinion held *inter alia* as follows:

“The policy must be construed strictly against the company. Another rule of construction is that such a policy shall be interpreted according to the laws of the state in which it is issued. Before the enactment of the Act of 1921, in order to convict one of larceny, it was necessary to establish an intent to take another’s property permanently and wholly. So that, where one entered another’s car for the purpose of driving to a particular place, or to take a joy ride with an intention of

returning it at the completion of his journey, he was not guilty of larceny. The effect and purpose of the Act of 1921 was to make such a taking larceny even though the intent was not to permanently and wholly deprive the owner of its use."

Thus here again it was established that larceny contemplates the taking of another's property *permanently and wholly* unless there is a specific statute to the contrary.

The second instance cited by the plaintiff is the case of *Miller v. Newark Fire Insurance Co.*, 12 La. App. 315, 125 So. 150 (1929). A reading of this case, however, discloses that the Court in its Opinion stated as follows:

"Defendant cites interesting authority to the effect that the unlawful use by a garage man of a car left in his custody is not theft, or larceny. *Van Vechten vs. American Eagle Fire Ins. Co.*, 239 N. Y. 303, 146 N. E. 432, 38 A. L. R. 1115. *This doctrine appears sound, and if the record warranted us in finding that the negro intended to return the car, the case mentioned would be applicable.*" (Italics supplied.)

Incidentally, in this case the question of the intent of the wrong doer in taking the car was left for determination by the Jury.

The third instance cited by the plaintiff is the case of *Delong v. Massachusetts Fire and Marine Co.*, 256 N. Y. Supp. 300. This case tried in a Court inferior to the Court of Appeals of the State of New York was decided with particular reference to Sections 1293-a and 1307 of the New York Penal Laws, the first of which sections by specific language renders an "Un-

authorized Use of Motor Vehicles" a larceny. Also, the Court in this case submitted to the Jury for its determination the question as to whether the taking of the automobile was a theft within the terms of the policy as defined by common thought and speech.

II.

The charge of the Court and instruction allowed were virtually a direction to the Jury to find for the plaintiff.

Since there was no dispute on the question as to whether Harrison had authority to take the car for his own purposes, the charge of the Court (R. 12) and Instruction made (R. 16) were in effect a direction to the Jury that they bring in a verdict for the plaintiff. In other words, the Court in derogation of the Statutes contained in the Code, and in derogation of the fact that Harrison pleaded guilty not to having stolen the car, but to having used it without authority as above stated, and in further derogation of the plain intendment of Congress that there should be a cleavage and distinction between the two crimes, nevertheless, took it upon himself to hold that there was a "theft" or "larceny" under the policy.

III.

The Court erred in not having permitted counsel for the defendant to present proper and valid argument to the Jury.

If it be contended that whether there was or was not a "theft" of plaintiff's car was a matter of intent

on the part of Harrison, it follows that counsel for the defendant had the right to argue that point to the Jury. But that Court below (R. 11, 12) stopped counsel for the defendant in his argument on the question. The Court held that such argument was improper and that the question of Harrison's intent could not be investigated, but the Jury (R. 12) "are to regard as a theft the action on the part of Harrison in taking that automobile, if they find that he did take it without authority, on a mission of his own."

Conclusion.

It is, therefore, respectfully submitted that the judgment of the Court below should be reversed with instructions to enter judgment for the defendant.

Respectfully submitted,

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FILED JAN 11 1939

Joseph W. Stewart

CLERK

**United States Court of Appeals for the
District of Columbia**

APRIL TERM, 1939

No. 7517

**PENNSYLVANIA INDEMNITY FIRE CORPORATION,
A CORPORATION, PLAINTIFF IN ERROR,**

vs.

HARRY E. ALDRIDGE, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

**LEROY S. BENDHEIM,
JULIAN H. REIS,
*Attorneys for Defendant in Error.***

INDEX.

SUBJECT INDEX.

	Page
Statement of the case.....	1
Summary of the argument	2
Argument	2
Conclusion	8

CASES CITED.

Allen v. Berkshire Mutual Fire Insurance Co., 105 Vt. 471, 168 Atl. 698	5
Aschenbrenner v. U. S. Fidelity & Guaranty Co., 292 U. S. 80.....	6
Automobile Underwriters Co. v. Rhinehold (Tex.), 255 S. W. 1116....	5
Boyle v. Yorkshire Ins. Co., Ltd., 56 Ont. L. Rep. 564.....	5
Brady v. Norwich Union Fire Insurance Society, 47 R. I. 416, 133 Atl. 799	4
Buxton v. International Indemnity Co., 47 Cal. App. 583, 191 Pac. 84	5
Federal Insurance Co. v. Hiter, 164 Ky. 743, 176 S. W. 210.....	5
Globe & Rutgers Fire Insurance Co. v. House, 163 Tenn. 585, 45 S. W. (2d) 55	6
Granger v. Farrant, 179 Mich. 19, 146 N. W. 218.....	3
Granger v. New Jersey Insurance Co., 108 Cal. App. 290, 291 Pac. 698	4
James et al. v. Phoenix Assurance Co., Ltd., 75 Colo. 209, 225 Pac. 213	4, 6
Mays v. New Amsterdam Casualty Co., 40 App. D. C. 249.....	7
Murphy v. New York & Cuba Mail S. S. Co., 50 App. D. C. 341, 273 F. 305.....	3
Nugent v. Union Automobile Insurance Co., 140 Ore. 61, 13 Pac. (2d) 343	5
Ouimet v. National Ben Franklin Fire Ins. Co., 58 C. S. 299, 56 Dom. L. Rep. 501	5
Pask v. The London, &c., Fire Ins. Co., 211 Ill. App. 271.....	4
Price v. Royal Insurance Company, 119 Wash. 93, 204 Pac. 803.....	5
Slomowitz v. Union Insurance Co. of Canton, Ltd., 90 Pa. Sup. Ct. 366.....	5
Southern Casualty Co. v. Landry (Tex.), 266 S. W. 804.....	4
Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311.....	6
Stroehmann et al. v. Mutual Life Ins. Co. of New York, 300 U. S. 435	6
United States Mutual Accident Ass'n of City of New York v. Hodgkin, 4 App. D. C. 516	7

	Page
Weir v. Central National Fire Insurance Co., 194 Iowa 446, 189 N. W. 794	5
Wieson v. Automobile Insurance Company of Hartford, Conn., 2 N. J. Misc. 1129, 126 Atl. 652. [Aff. 130 A. 921]	3, 4

STATUTES AND TEXTS.

2 Bouvier, Law Dictionary, Rawles Third revision, Pg. 3267	4
District of Columbia Code of 1901 (31 Stat. 1189), Section 826	6
District of Columbia Code as amended by Act of June 30, 1902, (32 Stat. L. 534), Section 826 (a)	6
District of Columbia Code as amended by Act of February 3, 1913, (37 Stat. 656), Section 826 (b)	6

**United States Court of Appeals for the
District of Columbia**

APRIL TERM, 1939

No. 7517

**PENNSYLVANIA INDEMNITY FIRE CORPORATION,
A CORPORATION, PLAINTIFF IN ERROR,**

vs.

HARRY E. ALDRIDGE, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT of the CASE.

The question in this case is whether, under the circumstances disclosed by the record, the defendant is liable under the following provisions of an insurance policy issued by it (R. 17) :

“* * * Pennsylvania Indemnity Fire Corporation
of Philadelphia, Pa., will

Pay For Any Loss of or Damage to Described Motor-
Vehicle and/or Its Attached Equipment

other than damage caused by Collision or Upset, but
not exceeding a limit of insurance of \$650 * * *

“* * * damage resulting from theft * * * shall not be deemed damage caused by collision or upset.”

This case, therefore, turns on whether there was a theft within the meaning of the policy provisions above quoted.

There was no competent evidence that Harrison was returning the car to the plaintiff's home at the time of the collision. His statement to the police officer that he was so returning it, was merely a self-serving declaration. He had driven the car into Maryland and, after the collision, when asked by the officer why he was at the point of collision, he said he was taking home one of the boys who had accompanied him on his ride.

SUMMARY of the ARGUMENT.

1. A theft had occurred within the meaning of the policy.
2. The case was properly submitted to the jury.
3. Counsel for the defendant was not improperly hampered in his argument to the jury.

ARGUMENT.

1

A theft had occurred within the meaning of the policy.

The defendant's contention is primarily that at the time of the accident Harrison was returning the car to the plaintiff, and that, therefore, there was no theft within the meaning of the policy. The testimony on this point is as follows (R. 10):

Q. Did the boy tell you that he had been out to Hyattsville with two or three colored boys that he picked up? A. Three other colored boys.

Q. And he told you he was returning this car to Mr. Aldridge's place at the time? A. He said he was returning it, yes, sir.

Q. And he said he had gotten lost in coming back to town, didn't he, gone off on the wrong street somewhere? A. I don't recall that.

Q. Don't you recall his saying he was looking for Rhode Island Avenue and got mixed up in the streets?

A. I asked him, as a [I] remember, why was he at Seventeenth and Jackson going back to the Trinidad section, and he told me one of the boys that was with him lived in the northwest, and that he was taking that boy home.

Q. Before returning to Mr. Aldridge's place? A. He said he was taking that boy back home, yes, sir.

As will be seen, the testimony seems to be self-contradictory, but to the extent that the officer testified that Harrison stated he was returning the car to the plaintiff's place, it must be disregarded as hearsay and a self-serving declaration, and of no probative force.

Murphy v. New York & Cuba Mail S. S. Co., 50 App.

D. C. 341, 345, 273 F. 305;

Granger v. Farrant, 179 Mich. 19, 146 N. W. 218;

Wieson v. Automobile Insurance Co. of Hartford, 2 N. J. Misc. 1129, 126 A. 652 [Aff. 130 A. 921].

The contention that there was no theft within the meaning of the policy because there may have been absence of an intention permanently to deprive the plaintiff of his automobile, is contrary to the weight of authority. As used in policies of insurance, the term "theft" is not confined to larceny as defined by the criminal law.

"The word 'theft' has a very general meaning, and we are of the opinion that interpreting the language of the parties according to the ordinary meaning of the word, the act in question should be held to have been a theft, for the purposes of this suit. If there were any ambiguity in the matter, we should be compelled,

under an established rule of construction, to resolve it in favor of the assured."

James et al. v. Phoenix Assurance Co., Ltd., 75 Colo. 209, 211, 225 Pac. 213.

"By continuing to use such a general term as theft in a policy, it may be that an appearance of more complete protection to the assured is made than is really intended. But if this is the fact, the remedy is simple; it is only necessary for the insurer to add another exception to the policy, limiting exactly the class of thefts insured against."

Brady v. Norwich Union Fire Insurance Society, 47 R. I. 416, 418, 133 Atl. 799.

"In construing the word 'theft' it should be given the usual meaning and understanding employed by persons in the ordinary walks of life, and should be construed as common thought and common speech now imagine and describe it * * * The words employed, therefore, must be deemed to have been used in their general and popular sense rather than with specific reference to the precise definition of a criminal statute."

Granger v. New Jersey Insurance Co., 108 Cal. App. 290, 293, 291 Pac. 698.

"Theft" is a wider term than larceny and includes other forms of wrongful deprivation of property of another.

2 Bouvier, Law Dictionary, Rawles Third Revision, Pg. 3267.

To the same effect see the following cases:

Wieson v. Automobile Insurance Company of Hartford, Conn., 2 N. J. Misc. 1129, 126 Atl. 652 [Aff. 130 A. 921].

Southern Casualty Co. v. Landry (Tex.), 266 S. W. 804 (prospective purchaser).

Pask v. The London, &c., Fire Ins. Co., 211 Ill. App. 271.

- Slomowitz v. Union Insurance Co. of Canton, Ltd., 90 Pa. Sup. Ct. 366.
- Boyle v. Yorkshire Ins. Co., Ltd., 56 Ont. L. Rep. 564.
- Ouimet v. National Ben Franklin Fire Ins. Co., 58 C. S. 299, 56 Dom. L. Rep. 501.
- Price v. Royal Insurance Company, 119 Wash. 93, 204 Pac. 803.
- Weir v. Central National Fire Insurance Co., 194 Iowa 446, 189 N. W. 794.
- Allen v. Berkshire Mutual Fire Insurance Co., 105 Vt. 471, 168 Atl. 698.
- Nugent v. Union Automobile Insurance Co., 140 Ore. 61, 13 Pac. (2d) 343. (Automobile delivered upon receipt of check which was subsequently dishonored.)
- Automobile Underwriters Co. v. Rhinehold (Tex.), 255 S. W. 1116.
- Federal Insurance Co. v. Hiter, 164 Ky. 743, 176 S. W. 210. (Loaned car.)
- Buxton v. International Indemnity Co., 47 Cal. App. 583, 191 Pac. 84. (Conditional vendee.)

It is a matter of common knowledge that in selling theft policies, insurance salesmen do not advise assureds that the taking of the car must constitute a common-law larceny before they will be covered under the policy. Nor are technical distinctions of the criminal law in any manner made a condition upon which the policy is sold, but on the contrary, it is commonly represented that if the car be taken out of the possession and control of the assured by a wrongdoer, any loss resulting will be covered under the policy.

While we contend that the term theft as used in the policy is not to be defined as identical with larceny, we nevertheless submit that the crime commonly known as "joy riding" is, under our statutes, a species of larceny.

The District of Columbia Code of 1901 (31 Stat. 1189) does not in express terms define larceny. Section 826 as originally drawn simply provided that whoever shall feloniously take and carry away anything of value of thirty-five dollars or upward shall suffer imprisonment for not less than one nor more than ten years.

By the Act of June 30, 1902 (32 Stat. L. 534) a new paragraph was added to this section, known as Section 826 (a), which prescribed a penalty for certain acts by which the offender wrongfully used or wasted electrical power.

By the Act of February 3, 1913 (37 Stat. 656) Section 826 was further amended by adding a new paragraph known as Section 826 (b), which prescribed the punishment for the unauthorized use of vehicles.

It will thus be seen that the common-law definition of larceny has been expanded so as to include not only those acts which were larceny at common law, but also the theft of electricity, which is not susceptible of being taken and carried away in the common-law sense, and also the unauthorized use of vehicles, in which some of the elements of common-law larceny may be absent; but they are all a species of larceny.

Globe & Rutgers Fire Insurance Co. v. House, 163 Tenn. 585, 45 S. W. (2d) 55.

James et al. v. Phoenix Assurance Co., Ltd., 75 Colo. 209, 211, 225 Pac. 213.

In case of ambiguity, policies of insurance are to be construed against the insurer.

Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311.
Aschenbrenner v. U. S. Fidelity & Guaranty Co., 292 U. S. 80.

Stroehmann et al. v. Mutual Life Ins. Co. of New York, 300 U. S. 435.

Mays v. New Amsterdam Casualty Co., 40 App. D. C. 249.

United States Mutual Accident Ass'n of City of New York v. Hodgkin, 4 App. D. C. 516.

2.

The case was properly submitted to the jury.

The charge to the jury was correct since it was left to the jury to find with what intent Harrison took the car (R. 13). The jury were instructed that if they found that he took it on a mission of his own with the intent of going on a personal and private mission, without the authority of the plaintiff, and that the collision resulted while he was on such mission or on his way back the plaintiff was entitled to recover (R. 13) and that if they found that Harrison unlawfully used the car for a purpose of his own, a theft occurred within the meaning of the policy (R. 13, 14, 16).

3.

Counsel for the defendant was not improperly hampered in his argument to the jury.

The record does not sustain the contention made on behalf of the defendant that the trial Court stopped counsel for the defendant in his argument to the jury in regard to the intent of Harrison. The only interruption to the argument of counsel for the defendant occurred when counsel for the defendant undertook to argue to the jury the meaning of the word "theft" (R. 11). It does not appear that counsel for the plaintiff attempted to argue to the jury the question of Harrison's intent. The question of intent was in fact submitted to the jury by the Court in his charge (R. 13).

Furthermore, no exception was taken to anything that occurred during the course of the argument on behalf of the defendant.

CONCLUSION.

It is respectfully submitted that the judgment of the Court below should be affirmed.

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